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In the Supreme Court of the United States

OCTOBER TERM, 1938

No. 244

THE CHIPPEWA INDIANS OF MINNESOTA, APPELLANTS

v.

THE UNITED STATES

ON APPEAL FROM THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the Court of Claims (R. 36-48) is not yet reported.

JURISDICTION

The judgment from which the appeal is taken was entered January 12, 1938 (R. 11). On May 31, 1938, a motion for a new trial by the appellants, filed February 19, 1938, was denied, and a motion for a new trial and request for amendment to the special findings of fact by the appellee, filed March 7, 1938, was allowed in part (R. 11). This appeal was allowed on July 21, 1938 (R. 51). Probable

jurisdiction was noted October 10, 1938. The jurisdiction of this Court is conferred by the Special Jurisdictional Act of June 22, 1936, c. 714, 49 Stat. 1936.

QUESTIONS PRESENTED

1. An Act of Congress of May 23, 1906, created a national forest upon lands held by the United States in trust to be sold for the benefit of an Indian tribe and provided for an appraisal of the timber thereon to be approved by the President and for the payment to the Indians of the appraised values. Did the Court of Claims err in holding that a taking of the lands for a public use occurred on the effective date of the Act and not at the time of the subsequent Presidential approval of the appraisal?

2. Certain lands were excluded from the boundaries of an Indian reservation by erroneous surveys in 1872 to 1885 and were disposed of by the United States under the public land laws. Thereafter, pursuant to an Act of Congress of January 14, 1889, lands of the reservation were ceded to the United States in trust to be sold for the benefit of the Indians. The Jurisdictional Act confers jurisdiction on the Court of Claims to adjudicate claims arising under the Act of 1889. In the absence of a showing by the claimant that the United States first learned of the unlawful nature of the disposals after the cessions made pursuant to the Act of 1889, did the Court of Claims err in holding that the

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Jurisdictional Act did not confer authority to entertain a claim for the value of the lands erroneously excluded and disposed of?

STATUTES INVOLVED

The pertinent provisions of the Act of January 14, 1889, c. 24, 25 Stat. 642, providing for cessions of lands to the United States in trust to be disposed of for the benefit of the Indians; the Act of June 27, 1902, c. 1157, 32 Stat. 400, setting aside lands to be selected for a forest reserve; the Act of May 23, 1908, c. 193, 35 Stat. 268, creating and appropriating lands for a national forest and providing for payment therefor; and the Jurisdictional Act of May 14, 1926, c. 900, 44 Stat. 555, as amended by the Acts approved April 11, 1928, c. 357, 45 Stat. 423, and June 18, 1934, c. 568, 48 Stat. 979, are set forth or adequately summarized in the special findings of the court below (R. 12-20) and are referred to in the Argument, *infra*.

STATEMENT

This is a suit brought by the Chippewa Indians of Minnesota to recover (a) \$1,060,887.07, with interest from 1923, as the value of certain timber which, it is alleged, was taken by the United States from the Indians, and (b) \$20,457.25, together with interest from March 4, 1890, as the value of 16,365.80 acres of land which, it is alleged, were wrongfully disposed of by the United States prior to January 14, 1889, as a consequence of erroneous surveys of reservation boundaries (R. 8-9).

The Court of Claims held that the timber was appropriated by the Act of May 23, 1908, setting apart the lands involved as a national forest and that the timber had no merchantable value as of that date (R. 44). The court also held that the claim for the value of the lands lost through erroneous surveys, made in 1872 to 1885, did not arise under the Act of January 14, 1889, or any subsequent Act of Congress, as specified in the Jurisdictional Act under which the suit was brought (R. 47). Accordingly, judgment was entered dismissing the petition (R. 11, 48), and the Indians have appealed.

The material facts and statutes essential to an understanding of the case may be summarized as follows:

The Act of January 14, 1889, offered, for the acceptance or rejection of the Minnesota Chippewas, a plan for the cession to the United States of all the lands in their several reservations except those required and reserved to fill allotments on the White Earth and Red Lake reservations (Finding 4, R. 14). The terms of cession required the United States to classify the lands ceded as "pine lands" and "agricultural lands," to sell the "pine lands" at public auction at not less than the value fixed for the pine timber, and to sell the "agricultural lands" under the homestead laws at \$1.25 per acre. The net proceeds were to be placed "in the Treasury of the United States to the credit

of all the Chippewa Indians in the State of Minnesota as a permanent fund" (Finding 6, R. 15). Agreements of cession were thereafter concluded with the Indians (Finding 5, R. 15) and approved by the President on March 4, 1890 (R. 38).

The Act of June 27, 1902, set aside as "forestry lands" 200,000 acres of the several million acres which had been ceded by the Act of 1889, *supra*—the forestry lands to be selected by the Forester of the Department of Agriculture "as soon as practicable." All merchantable pine timber on these lands was to be sold, except 5 percent thereof to be selected by the Forester, which was to be left standing for reforestation.¹ No provision was made for reimbursing the Indians for the 5 percent of the timber or for the 200,000 acres. Land not set aside for forestry purposes was to be opened to homestead entry after the timber had first been sold and removed (Finding 7, R. 16-17).

The Act of May 23, 1908, created a national forest described by metes and bounds, in which was included nearly all of the 200,000 acres reserved in the Act of June 27, 1902. Sale of the "merchantable pine timber," except for the 5 percent of timber

¹ The land and all timber on certain sections, islands, and points were also reserved from sale by this Act, but no claim is made for any timber on these tracts. Therefore, mention of them is omitted, even though they recur frequently in the statutes and record herein coupled with other land. Full compensation for all timber on these tracts was paid to the Indians in 1923 (R. 22-23).

reserved from sale by the Act of June 27, 1902, and 10 percent reserved under this Act for reforestation purposes, was to be continued and all moneys received prior to appraisal placed to the credit of the Indians. The Act provided for the immediate appointment of a Commission to appraise the reforestation timber, and directed the Commission to ascertain the acreage covered by the provisions of the act and to add to the appraised value of the timber an amount equal to \$125 for each acre. Provision was made for crediting to the Indians' permanent fund the amount of the award as finally determined (Finding 8, R. 17-19).

The Commission was not appointed until December 18, 1922 (Finding 9, R. 20). On May 31, 1923, pursuant to the Commission's award, \$1,490,195.38, was credited to the Indians' permanent fund in payment of the land and timber reserved for national forest purposes (Finding 10, R. 22-23). Under an appropriation made by the Act of March 3, 1923, 44 Stat. 173, approximately \$490,000 in addition was thereafter credited to the Indians as interest from 1909 to 1925 upon the amount awarded for the lands and 5 and 10 percent timber reserved (Finding 12, R. 25-26, 41).

First claim: The award did not include white and Norway pine less than ten inches in diameter, jack pine, poplar, white birch, yellow birch, oak, basswood, ash, elm, spruce, tamarack, balsam, and cedar, standing upon lands set aside for national forest

purposes of no merchantable value in 1908 but of an estimated value of \$1,060,887.07 in 1922, recovery for which is sought in this suit (Finding 11, R. 23).

Second claim: As a result of errors in surveys, 16,265.80 acres of land, which should have been included in the Red Lake Reservation as fixed by the treaties of February 22, 1855, 10 Stat. 1165, and October 2, 1863, 13 Stat. 667, were taken by the United States as public lands and disposed of prior to January 14, 1889, without any consideration therefor to the Indians. The title of the Red Lake bands of Chippewas to their reservation, except certain lands reserved for allotment purposes, was ceded to the United States by agreement pursuant to the Act of January 14, 1889, for the purpose and upon the terms stated therein. In their second claim, appellants seek recovery of the value of the erroneously excluded lands at the rate of \$1.25 per acre (Finding 15, R. 27-28).

SUMMARY OF ARGUMENT

I. The court below correctly dismissed appellants' first claim for the value of the timber, since the appropriation of the Indians' beneficial interest therein by the United States was consummated on the effective date of the Act of May 23, 1908, which, *in praesenti*, set aside the Indian lands for a national forest.

Those provisions in the Act upon which appellants rely in no way negative the express intention

of Congress to establish the forest reserve immediately, and afford no tenable basis for their contention that the appropriation of their interest in the property took place upon the approval of the appraisal by the President in 1923.

II. The court below correctly dismissed appellants' claim for the value of the lands erroneously excluded by the surveys made in 1872 to 1885, and disposed of by the United States prior to 1889. By the Jurisdictional Act under which this suit was brought, the court's jurisdiction was limited to claims arising under the Act of January 14, 1889, or any subsequent Act. Since the appellants have failed to show that the United States first learned of the unlawful nature of the disposals after the censuses were made pursuant to the 1889 Act, they have failed to establish the requisite jurisdiction for an adjudication of their claim.

ARGUMENT

I

THE APPELLANTS' FIRST CLAIM WAS CORRECTLY DISMISSED BECAUSE THE TIMBER WAS APPROPRIATED FOR A NATIONAL FOREST ON THE EFFECTIVE DATE OF THE ACT OF MAY 22, 1906—AND NOT ON THE DATE OF THE APPROVAL OF THE APPRAISAL IN 1923.

The sum awarded by the Commission and that appropriated by the Act of March 3, 1926, 44 Stat. 173, as a result of the Commission's recommendation, totaled, together with interest, \$1,963,240.12 (Findings 10 and 12, R. 22, 26). The appellants

admit (R. 9) that these payments completely discharged the indebtedness found by the Commission to be equitably due them by reason of the creation of the national forest, with the exception of their present claim for the value of the timber here involved which had no merchantable value in 1906, but was reasonably worth \$1,000,887.07 in 1922 (Finding 14, R. 27, 45).

Thus, the crucial question to be determined here is: When did the taking of the timber occur, upon the effective date of the Act of May 23, 1906, or upon the date of the President's approval of the appraisal? Appellants contend that this timber was not taken from them until the President, in 1923, approved the Commission's appraisal, it being their theory that the reservation of the lands for national forest purposes, made in the Act of May 23, 1906, was wholly ineffective until the appraisal was approved.

It is the position of the United States that the immediate effect of the Act of May 23, 1906, was to deprive the appellants of their right to have the timber sold for their benefit since the Act, by its express terms, effectuated a present and immediate creation of a national forest.² /

² There is no dispute that the appropriation of the timber by the United States, whether it occurred in 1906 or in 1923, was a lawful exercise of the power of eminent domain (*United States v. Klamath and Moadoc Tribes*, 304 U. S. 119); or that compensation is to be determined as of the date of the appropriation. *United States v. Rogers*, 255 U. S. 163; *Nonogahela Navigation Co. v. United States*,

A. THE ACT OF MAY 23, 1908, BY FORFEITING THE SALE OF THE LANDS AND TIMBER, DEPRIVED APPELLANTS OF THEIR BENEFICIAL INTEREST IN THE PROPERTY ON THE DATE OF ITS ENACTMENT.

Legal title to the appellants' lands held in trust by the United States under the Act of January 14, 1889, has always been in the United States, and the sessions pursuant to that Act extinguished the Indian title of use and occupancy. The terms of the trust, however, required that the United States sell the lands and timber for the benefit of appellants, and consequently they retained a beneficial interest therein. This beneficial interest in having the lands and pine timber sold and the proceeds deposited in a permanent fund was a property right subject to appropriation. (Compare *Brooks-Seaton Corp. v. United States*, 265 U. S. 106. It was (except as to the best and merchantable pine timber specifically permitted to be sold) appropriated as a direct and immediate consequence of the Act of May 23, 1908, for because of that Act performance of the trust by the United States was made impossible. In short, it is clear that, from the day the timber was reserved from sale—May 23, 1908—the appellants as *certaini qui trisent* were deprived of their beneficial interest in the timber, i. e., their right to have it sold for their benefit.

148 U. S. 312; see also *Jacobs v. United States*, 290 U. S. 8, 14; *Shoshone Tribe v. United States*, 290 U. S. 476; *United States v. Klamath and Modoc Tribes*, *supra*.

The fact that payment of compensation was long deferred is not material in determining the date of taking, especially since this delay can in no sense be attributed to

That such a consequence was intended is clear, for the language of the Act of May 23, 1908, is susceptible of no other construction than that Congress intended to appropriate the property for national forest purposes forthwith.

Section 1 explicitly provides: "That there is hereby created in the State of Minnesota a national forest consisting of lands and territory described as follows: * * *." In Section 5 are the expressions: "the lands set aside by this Act for a National Forest," and "the National Forest hereby created." These terms speak in the present and plainly show that the national forest came into existence immediately, and, as the court below said (R. 43):

* * * in the absence of other language in the act showing a contrary intent [these words] impel the conclusion that it was the intention of Congress to appropriate the lands included in the national forest and the timber growing thereon as of the date of the act, May 23, 1908, and not at some subsequent date.

Congress and was in fact contrary to its express direction that commissioners be appointed "at once" and proceed "forthwith." Act of May 23, 1908, Sec. 2, 35 Stat. 271. The material and determining factor is that appellants were deprived of their interest in the property, with the exception noted, on the date of the Act of May 23, 1908. This, therefore, was the date of the appropriation. *United States v. Rogers*, 255 U. S. 163, 169; *United States v. Highsmith*, 255 U. S. 170; *Hurley v. Kincaid*, 285 U. S. 95, 103, 104. Cf. *Shoshone Tribe v. United States*, *supra*.

B. APPELLANTS' INTERPRETATION OF THE ACT IS UNREASONABLE

(1) For language showing a contrary intention appellants rely (Br. 23) upon the provision found in Section 5 of the Act:

* * * and after said appraisal the National Forest hereby created, as above described, shall be subject to all general laws and regulations from time to time governing national forests, so far as said laws and regulations may be applicable thereto.

From this provision appellants argue that the appropriation did not become effective and the lands were not included in the national forest until the appraisal was made.

The words "hereby created" in the quotation itself contradict this argument. But in any event, there is nothing inconsistent in the action of Congress in reserving a large area for national forest purposes in order to conserve the nation's resources and at the same time providing that the laws and regulations which apply to forest reserves generally shall not be applicable until a later date or until some administrative action has been taken. In so doing, the Act of Congress is none the less a reservation in *praesenti*, particularly when, as in this case, the area was already in the custody and protection of the United States and a large portion of it was in the charge of the Forester of the Department of Agriculture. Act of June 27, 1902, c. 1157, § 2, 32 Stat. 400, 403. Moreover, that Congress did not contemplate that any substantial period of time would elapse between the passage of

the Act and the approval of the appraisal is patent from its direction that the appraisers "shall at once be appointed" and "shall proceed forthwith" (Sec. 2).

(2) Appellants also argue (Br. 21, 22) that if there was a taking of any lands and timber by the Act of May 23, 1908, then there must have been a taking of all lands and timber within the boundaries of the national forest as of the date of the Act. To show that no such taking was intended they point out that the Act contains no provision for the acquisition of townsites and state swamp land selections within the forest boundaries and that Section 3 shows that there was no intention to appropriate individual Indian allotments therein. Appellants' premise is clearly unsound. The Act relates predominantly to, and its provisions for awarding compensation relate solely to, the lands and timber held in trust for the Indians. The title, use, and possession of the owners of other lands within the forest were not affected by the Act, for obviously Congress was in no sense attempting to exercise the power of eminent domain over privately owned lands.*

(3) To sustain their contention that "the date of appraisal established the date of appropriation," the appellants argue (Br. 23, 24): (1) That "the

*The Act of May 23, 1908, 35 Stat. 268, was proposed as an amendment to the Act of January 14, 1889, and the Act of June 27, 1902. The specific purposes of the Act were: (1) to define exactly the allotment of land and timber of the reserve, (2) to "specifically create such reserve," and (3) to

value of the land was to be fixed as of the date of the completion of the appraisal," (2) that "no timber could be cut and sold from the ten sections, islands and points until the appraisal and payment were made," (3) that "all monies received from the sale of all timber on any of the lands 'prior to the appraisal'" was to be credited to the Indians, and (4) "only after said appraisal was the National Forest to become subject to Appellee's general laws and regulations governing national forests." (See also Br. 26, 27.)

None of these arguments is tenable. (1) Section 2 of the Act itself fixes the value of the land at \$1.25 an acre. (2) Without reference to the date of appraisal, Section 2 of the Act authorizes the make definite and fixed provisions for the appraisal of the land and of the timber to be left standing, all to be placed to the credit of the Indians (House Rept. 1463, 16th Cong., 1st Sess.).

Indeed, Congressman Hackney, a member of the subcommittee of the Committee on Indian Affairs, which investigated this bill, stated on the floor of the House:

"Now, if it were an original proposition to buy land for a forest reserve, there might be a difference of opinion as to the constitutional power of the Government; but here are the Indian lands which were opened to settlement in 1889, and then Congress passed the act of 1902, stopping the settlement and setting apart these lands for forest-reserve purposes. The simple proposition comes up to us now, Shall we pay for what we have got? We have this national forest; it is a forest reserve created by that act; the land is in the possession of the Government, as the act of 1902 provides that from the time of taking over it should thenceforth be a national forest reserve, the same as though created by any other act of Congress or by proclamation. This is a simple process of getting out of a somewhat complicated and unpleasant

Forester from time to time to sell so much of the timber on the sections, islands and points as he may deem advisable. (3) Presumably plaintiff contends that since moneys received from the sale of timber up to the time of appraisal were to be paid directly to the Indians, this indicates that the United States did not appropriate the unsold timber until the date of the appraisal. But clearly this provision simply substitutes actual values where timber had been previously sold in place of a less accurate appraised value that might be made at some later date. The provision plainly had no relevance to the date of the appropriation of the uncut timber. (4) The postp. moment of the appli-

situation there with respect to the Indian rights, on the one hand, and the rights of settlers on the other, and the question of good faith of the Government as well."

As a matter of fact, members of Congress were of the view that the "taking" of the Indians' lands had occurred prior to 1908. Congressman Hackney stated: "The title of this bill is a little misleading. It is not an act creating a national forest. The national forest was created under the Act of June 27, 1902." Congressman Saunders was of the same view:

"This is not an original proposition, as has been stated by the gentleman from Missouri, for the purchase of land for a forest reserve, but it is a sequestration of an Indian reservation for this purpose, and as the Government takes the Indian reservation, as a matter of course, the Government will pay the Indians for the land taken.

"Now, as to the original designation of the land for a forest reserve, that was under the acts heretofore passed by this House, but the formal establishment of the forest reserve is by the act that we are now considering" (42 Cong. Rec. 6427-6428).

action of the laws and regulations governing national forests generally did not operate to defer the appropriation of appellants' interest in the timber in suit, as has been shown *supra*, p. 12.

(4) Finally, appellants urge (Br. 34, 35) that the opinion of the Solicitor of the Department of Agriculture, dated January 20, 1922 (Finding 2, R. 30), and approved by the Solicitor of the Department of the Interior, directing that the reserved timber be appraised as of the time of the appraisal, "were holdings * * * that the taking would not occur until after appraisal and payment." The entire opinion is not in the record, but if this is the legal effect of their interpretation of the Act of May 23, 1906, it is plainly erroneous for, as has been shown, *supra*, the clear intent of Congress was to acquire the property as of the date of the Act, and to have appraisers appointed "at once" who were to proceed "forthwith" to their duties. No intent or consent to pay the value of the property fourteen years later can be inferred. The rule that contemporaneous administrative construction is entitled to great respect is only applicable where there is ambiguity and doubt. *Swift Co. v. United States*, 105 U. S. 691, 695. Here the statute is not ambiguous and the construction not contemporaneous. It is submitted that under such circumstances the administrative construction relied upon here is entitled to very little weight.

The value of the timber for which claim is now made was admittedly \$1,060,887.07 in 1922 (R.

(45). The preponderance of evidence, as the Commission of 1922 found, is that it had no merchantable value in 1908 (R. 29). Since the appropriation occurred May 23, 1908, and the appellants' right to compensation is measured by the value of the property appropriated on that date, it follows that they are entitled to nothing for property which was then of no value, even though it subsequently acquired a value. The Court of Claims, therefore, was correct in dismissing the petition in respect to this claim.

II

APPELLANTS' SECOND CLAIM IS NOT SHOWN TO BE WITHIN THE SCOPE OF THE JURISDICTIONAL ACT OF MAY 14, 1924

By the treaties of February 22, 1855, 10 Stat. 1455, and October 2, 1863, 13 Stat. 667, the boundaries of the Red Lake Reservation became fixed. Thereafter through errors in surveys made in 1872 to 1885, lands which should have been excluded from the boundaries of the reservation were included, and lands which should have been included were excluded. This resulted in a net loss to the Indians of 16,365.80 acres, for which the appellants claim compensation at the rate of \$1.25 an acre with interest at 5 percent from March 4, 1890, the date on which agreements of cession under the Act of January 14, 1889, were approved by the President.

It may well be that the United States is morally bound to make restitution for the erroneous appro-

petition of these lands, but it is clear, we submit, that the court below was correct in dismissing appellants' second claim for want of jurisdiction.

The Act of May 14, 1924, conferred upon the Court of Claims jurisdiction to determine "all legal and equitable claims arising under or growing out of the Act of January 14, 1909 (Twenty-fifth Statutes at Large, page 849), or arising under or growing out of any subsequent Act of Congress in relation to Indian affairs with said Chippewa Indians of Minnesota may have against the United States". It is not disputed that the 16,365.80 acres of land were disposed of by the United States under the public land laws prior to January 14, 1909.

Under the decisions of this Court in *United States v. Creek Nation*, 295 U. S. 103, 111, and *Creek Nation v. United States*, 302 U. S. 620, the facts of which are strikingly similar to the present case, the taking of appellants' lands was not as of the date of the erroneous surveys but as of the dates of the disposals to third parties, and compensation is to be determined on the basis of the present full equivalent of the value of the lands as of those dates.

It is to be observed that the *Creek Nation* cases clearly recognized that until the erroneous disposals of the lands were confirmed by the United States by realizing the mistake and failing to take steps to remedy it, the Indian title was not extinguished. *United States v. Creek Nation*, 295 U. S. 103, 107,

III; *Creek Nation v. United States*, 302 U. S. 621, 621, 622. See also: *Leavenworth Etc. R. R. Co. v. United States*, 22 U. S. 733; *Becher v. W. & A. B. Co.*, 25 U. S. 511. If in the present case this confirmation took place after the cession made pursuant to the Act of January 14, 1889, then the title of the Red Lake lands to these lands was ceded to the United States in trust for the appellants. The failure of the United States to take steps to recover the lands and to dispose of them for the benefit of the appellants might give rise to a claim under the Act of January 14, 1889, of which the Court of Claims would have jurisdiction, notwithstanding that the confirmation related back to the dates of disposals. *Creek Nation* cases, *supra*; *Shoshone Tribe v. United States*, *supra*. If, on the other hand, there were an earlier confirmation, the Indian title was thereby extinguished and the claim for compensation could not conceivably arise under the Act of January 14, 1889, or a subsequent Act.*

The burden is on the appellants to bring themselves within the purview of the jurisdictional Act. *Klamath and Modoc Tribes v. United States*, 296 U. S. 244; *United States v. Michel*, 282 U. S. 656; *Schillinger v. United States*, 155 U. S. 163. As the record stands, it is plain that the disposals

*In the latter event, the right to any compensation that may be awarded for the taking belongs to the Red Lake lands and not to the appellants, since the former held title when the lands were disposed of and the disposals confirmed. *Chippewa Indians v. United States*, 301 U. S. 348, 372.

were prior to 1863, but there is nothing to show whether they were confirmed by knowledge of their wrongful character and failure to take action before or after the cessions made in that year. The appellants, therefore, have failed to establish jurisdiction to determine this claim.

Conclusion

It is respectfully submitted that the judgment of the Court of Claims was correct and should be affirmed.

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